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Divergent Evolution in the Law of Torts: Jurisdictional Isolation, Jurisprudential Divergence and Explanatory Theories

James Goudkamp

University of Wollongong, jamesg@uow.edu.au

John Murphy

Lancaster University, University of Manchester

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Recommended Citation

Goudkamp, James and Murphy, John, "Divergent Evolution in the Law of Torts: Jurisdictional Isolation, Jurisprudential Divergence and Explanatory Theories" (2016). *Faculty of Law, Humanities and the Arts - Papers*. 3451.

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Abstract

Since the first wave of law-and-economics scholarship in the United States in the early 1970s, scholars have spent a tremendous amount of time trying to come to grips with tort law from a theoretical perspective. Richard Posner was on the crest of that wave, and his voluminous writings¹ revolutionised how tort law is understood. He contended that tort law (as well as the law generally) is best explained on the ground that it maximises societal wealth. Posner, writing together with William Landes, asserted that 'the common law of torts' should be accounted for 'as if the judges who created the law through decisions operating as precedents in later cases were trying to promote efficient resource allocation'.² Many scholars, especially in the United States, remain in the thrall of Posner's economic model.

Keywords

isolation, jurisprudential, divergence, jurisdictional, explanatory, evolution, theories, divergent, torts:, law

Disciplines

Arts and Humanities | Law

Publication Details

J. Goudkamp & J. Murphy, 'Divergent Evolution in the Law of Torts: Jurisdictional Isolation, Jurisprudential Divergence and Explanatory Theories' in A. Robertson & M. Tilbury(eds), *The Common Law of Obligations: Divergence and Unity* (2016) 279-299.

Divergent Evolution in the Law of Torts: Jurisdictional Isolation, Jurisprudential Divergence and Explanatory Theories

JAMES GOUDKAMP AND JOHN MURPHY

I. Introduction

Since the first wave of law-and-economics scholarship in the United States in the early 1970s, scholars have spent a tremendous amount of time trying to come to grips with tort law from a theoretical perspective. Richard Posner was on the crest of that wave, and his voluminous writings¹ revolutionised how tort law is understood. He contended that tort law (as well as the law generally) is best explained on the ground that it maximises societal wealth. Posner, writing together with William Landes, asserted that ‘the common law of torts’ should be accounted for ‘as if the judges who created the law through decisions operating as precedents in later cases were trying to promote efficient resource allocation’.² Many scholars, especially in the United States, remain in the thrall of Posner’s economic model.

The main reaction to Posner’s account of tort law began in the 1990s. At the forefront of this reaction was Ernest Weinrib, who in 1995 published his ground-breaking *The Idea of Private Law*.³ In this book Weinrib attacked functionalist theories of private law, and of tort law in particular. Posner’s economic theory was Weinrib’s principal target. As part of that attack, Weinrib proposed a non-functionalist explanation of tort law based on the idea of corrective justice. Many other writers have made similar criticisms of Posner’s treatment of tort law, although the attacks have not all come from the same direction as Weinrib’s. These writers include Robert Stevens⁴ and John Goldberg and Benjamin Zipursky.⁵ As is

¹ For a conspectus of his work in relation to tort law, see RA Posner, ‘A Theory of Negligence’ (1972) 1 *Journal of Legal Studies* 29; WM Landes and RA Posner, ‘The Positive Economic Theory of Tort Law’ (1980) 15 *Georgia Law Review* 851; WM Landes and RA Posner, *The Economic Structure of Tort Law* (Cambridge, MA, Harvard University Press, 1987); RA Posner, ‘Wealth Maximization and Tort Law: A Philosophical Inquiry’ in DG Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, OUP, 1995) ch 4.

² Landes and Posner, *The Economic Structure of Tort Law*, above n 1, 1.

³ EJ Weinrib, *The Idea of Private Law* (Cambridge, MA, Harvard University Press, 1995).

⁴ R Stevens, *Torts and Rights* (Oxford, OUP, 2007).

⁵ See, eg, JCP Goldberg and BC Zipursky, ‘Torts as Wrongs’ (2010) 88 *Texas Law Review* 917.

the case with Weinrib, these other scholars are in large part concerned to demonstrate that Posner's explanation of tort law is unable to account for large swathes of tort law and is hence unconvincing. Like Weinrib, they also propose non-functionalist accounts of tort law, although their accounts are phrased in terms of rights rather than corrective justice.

There are obviously deep-seated disagreements between Posner, on the one hand, and Weinrib, Stevens and Goldberg and Zipursky, on the other hand, as to how tort law should be understood. Yet there are also significant disputes between Weinrib, Stevens and Goldberg and Zipursky. These disputes even include the question of whether their respective theories are materially different from each other, and if they are different, the respects in which they differ.⁶ However, there are also several things that all five of these theorists have in common. First, they are all offering *explanatory* theories of tort law. They are all, in other words, offering a model of tort law that they claim enables it to be understood as it presently exists.⁷ It is true that these scholars, most notably Posner,⁸ also offer blueprints for the law of torts that they believe we should have. But the fact that they all make prescriptive claims does not mean that they are not also endeavouring to explain the law that we currently have. In at least the cases of Weinrib, Stevens and Goldberg and Zipursky, the explanatory part of their work is clearly the dominant one, and they may even be reluctant to admit to making prescriptive claims. Secondly, all five theorists are seeking to explain *the whole* of tort law as opposed to just one or a few parts of it.⁹ None of these writers is concerned just to explain, for example, the tort of negligence, strict liability torts or torts that are actionable per se. Thirdly, all of the theorists are concerned to explain tort law not just in one jurisdiction but *in at least all of the major common law jurisdictions*. They intend their theories to be relevant across jurisdictional boundaries. Sometimes this is said expressly. Stevens, for example, contends that his book *Torts and Rights* 'would [have] look[ed] much the same if [he] had ... used the case law of any ... common law jurisdiction'.¹⁰ Usually, however, the inter-jurisdictional scope of the theorists' claims is implicit from, for example, the fact that they cite as evidence in support of their accounts cases from several jurisdictions.¹¹ Regardless of the precise form in which the evidence comes, it is clear that the theories in question are all *universal* theories of tort law.

Elsewhere, we have shown in much more detail why it is appropriate to understand the theories of Posner, Weinrib, Stevens and Goldberg and Zipursky as we have just described

⁶ Compare, eg, BC Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 *Georgetown Law Journal* 695 and EJ Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 *Florida State University Law Review* 273 (Zipursky contends that the civil recourse theory that he developed with Goldberg is different from Weinrib's corrective justice theory; Weinrib, replying, doubts that there is any material difference).

⁷ In relation to Posner, see the quotation in the opening paragraph of this chapter. Weinrib says that he wants 'to understand tort law' (Weinrib, above n 3, 3) and that 'Tort liability reflects corrective justice' (ibid 134). Stevens asserts that '[t]he law of torts is concerned with the secondary obligations generated by the infringement of primary rights' (Stevens, above n 4, 2). Goldberg and Zipursky 'argue ... for the descriptive superiority' of their civil resource theory (Goldberg and Zipursky, above n 5, 920).

⁸ See, eg, Posner, 'Wealth Maximization and Tort Law', above n 1, 101–11 (addressing what he calls the 'normative theory' of his economic analysis).

⁹ See the passages quoted above, n 7.

¹⁰ Stevens, above n 4, vii.

¹¹ eg, Weinrib invokes many cases from Australia, Canada, the United Kingdom and the United States in support of his theory. He presumably thinks that there is sufficient uniformity in the law in these jurisdictions to entitle him to draw on materials from any of them. Given this assumption of uniformity, he must also believe that the theory that he builds from the law in several jurisdictions must in turn apply to those jurisdictions.

them, namely, as universal explanatory theories of the whole of the law of torts.¹² In that work we have also argued at length why their exceptionally ambitious claims are overstated. We incorporate that analysis by reference. Very briefly, however, we note that the essential reason why we believe that they are unconvincing is that there are many important aspects of tort law that these theories cannot explain within any given jurisdiction. The gaps between the law and the respective theoretical accounts are significant, both in their number and their size. This difficulty for the theories is magnified greatly when one tries to apply them in more than one jurisdiction. We do not re-tread this ground in this chapter. Rather, our aim here is to demonstrate that it is highly improbable that a satisfactory universal explanatory account of the whole of tort law could be developed. We cannot, of course, prove a negative. We cannot, in other words, show that a satisfactory universal explanatory theory of the whole of tort law could never be devised. But we consider the probability that such a theory could be developed to be so remote that the search for one, which has now lasted for at least four decades, will almost certainly be in vain. In all likelihood, tort law as it exists throughout the common law world cannot be reduced to a single organising concept or principle given, among other things, its immense complexity and the fact that it is the product of so many different influences, and the significant differences in tort law between jurisdictions render fanciful the suggestion that any single account is capable of providing a compelling explanation of tort law in its entirety across multiple jurisdictions. Indeed, we think that the already remote probability that a satisfactory universal explanatory theory of the full range of tort law could be devised will dwindle over time. We hold this view because we believe that the scene is set for the already significant inter-jurisdictional differences between the systems of tort law in common law jurisdictions to increase.

II. Divergent Evolution in the Law of Torts

Divergent evolution is a familiar concept in biology. It refers to the process by which a single species develops into two species due to the gradual accumulation of differences between groups of the original species. This process usually occurs when two groups of the original species are separated from each other (for example, by an ocean) so that inter-breeding is impossible. Natural selection favours certain characteristics in one group and different characteristics in the other group. Animals with favoured characteristics become more populous within each group relative to those animals that lack the characteristics. The process continues and, over a long enough period of time, the accumulated differences become sufficiently significant that the two groups of animals constitute separate species.

An analogy can be drawn between divergent evolution in biology and inter-jurisdictional differences in the law of torts. We believe that common law systems have become increasingly isolated from each other with the result that local factors have been able to operate independently on tort law in these systems so as to yield distinct tort law regimes and, moreover, regimes that are likely, because of the isolation, to continue to grow further apart. The suggestion that there are distinct systems of tort law throughout the common

¹² J Goudkamp and J Murphy, 'Tort Statutes and Tort Theories' (2015) 131 *LQR* 133; J Goudkamp and J Murphy, 'The Failure of Universal Tort Theories' (2016) (forthcoming).

law world (as opposed to a law of tort that is shared by all common law jurisdictions) is not novel. Other writers have made similar claims. For example, Kit Barker, Peter Cane, Mark Lunney and Francis Trindade wrote in the fifth and latest edition of *The Law of Torts of Australia*, published in 2012:¹³

Since the first edition of this book was written [in 1985], Australian common law in general and Australian tort law in particular have become much more independent of foreign influence, and Antipodean tort law has, in important respects, diverged from its English roots. This trend has continued since the fourth edition was prepared [in 2006]. Importantly, too, English tort law is increasingly influenced by human rights law and European Union law, and resulting changes in the law seem to be creating new divergences between English and Australian tort law.

It is clear from this passage that these authors are conscious of both the phenomenon of jurisdictional isolation and the capacity of tort law to adapt to local pressures, leading to jurisprudential divergence. In this chapter, we explain the process of isolation and identify several local factors that have resulted in the divergent development of tort law in different jurisdictions.

It might be queried whether the analogy with divergent evolution in biology that we have drawn is apt. We think that the analogy is illuminating, but do not want to push it too far. There are obvious and significant differences between the evolution of species and the way in which the law of torts has been developed in common law jurisdictions. One such difference concerns the relevant timeframe. The evolution of species is generally measured on a geological timescale whereas the law can be changed essentially overnight. Another major difference is that the evolution of species involves the gradual accumulation of almost imperceptible changes whereas a single change in the law in a given jurisdiction can result in the law in that jurisdiction diverging dramatically from the law elsewhere. A final important difference is that the evolution of species is always a result of environmental pressures whereas this is not the case in relation to changes in the law. For example, judges in a given jurisdiction might change a given rule based simply on their ideological preferences as opposed to any differences in the environment in that jurisdiction compared with the environment in other jurisdictions.

III. Jurisdictional Isolation

In this part of the chapter, we contend that, whereas in the past common law jurisdictions were very closely connected to each other, they are now quite isolated from each other, and that this isolation is entrenched. We should explain precisely what we mean by ‘isolation’. When we say that one jurisdiction has been isolated from another, we mean to say that they do not share the same sources of law. By ‘sources of law’, we do not intend to refer to the *types* of material that are authoritative as to what the law is, such as legislation and cases. (Obviously, all common law jurisdictions sing from essentially the same hymn sheet in

¹³ K Barker, P Cane, M Lunney and F Trindade, *The Law of Torts in Australia*, 5th edn (Oxford, OUP, 2012)

14 (footnote omitted). See also the analysis by Trindade, writing alone, concerning ‘how indigenous, how Australian, the law of torts has become over the last three decades’: F Trindade, ‘Towards an Australian Law of Torts’ (1993) 23 *Western Australia Law Review* 79, 79.

terms of the types of materials that they regard as being authoritative.) Rather, by sources of law, we mean to refer to the *specific manifestations* of the authority to declare the law, such as a particular judicial decision. Our claim is that common law jurisdictions today are to a large degree isolated from each other in the sense that (to continue the example of judicial decisions), judgments delivered in one jurisdiction lay down the law only in the jurisdiction in which they were delivered. This is not a bold claim. However, it is essential for us to establish it as it is a crucial step in our argument that jurisprudential divergence in the law of torts is likely to increase, which in turn has ramifications for the probability that a compelling universal explanatory theory of the whole of tort law can be developed. We also feel that the range of factors that have led to jurisdictions becoming isolated has not been properly appreciated, and so see a need to elaborate upon the process of isolation.

A great many factors have brought about the transition that has occurred throughout the common law world from interdependence to independence. We discuss some of the more interesting and significant of those factors. To be clear, we are not concerned in this chapter with the underlying political reasons that led to the current situation of jurisdictional isolation (such as, for example, a perception that it is inconsistent with the concept of nationhood for a legal system to be dependent on the sources of law of another jurisdiction, a rejection of colonialism, and so on). Rather, we are interested in the specific legal changes that took place that led to jurisdictions lacking unity in terms of their sources of law. We explore (1) the shrinking overseas jurisdiction of the Privy Council; (2) the reduced precedential force of British authority; (3) the reduced deference to British authority; (4) a tendency towards judicial parochialism in some jurisdictions; (5) harmonisation of legal systems with different legal traditions; and (6) the growth of legislation in the tort law context.

Shrinking Overseas Jurisdiction of the Privy Council

In earlier times, the Privy Council was the final court of appeal for many jurisdictions. Indeed, by almost any conceivable measure of the extent of a court's jurisdiction (eg, the number of people subject to its authority, the size of the geographical area in which its decisions apply, and so on), the Privy Council had a larger jurisdiction than any other court that has ever existed. Its position at the apex of numerous court hierarchies made a significant contribution to uniformity in the law across the common law world. Indeed, it was thought in the past that the Privy Council enjoyed a judicial function not just out of a 'desire to govern' the 'countless millions ... all over the world'¹⁴ but also as a result of a commitment to the view that there was and should be a single common law throughout the world.¹⁵ The possibility that there could be as many systems of common law as there were common law jurisdictions was regarded as deeply repugnant. For example, in *Trimble v Hill* the Privy Council said that 'it is of the utmost importance that in all parts of the Empire where English law prevails, the interpretation of that law by the Courts should be as nearly

¹⁴ Henry (later Lord) Brougham in the House of Commons, quoted in K Keith, 'The Interplay with the Judicial Committee of the Privy Council' in L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords 1876–2009* (Oxford, OUP, 2009) 315.

¹⁵ See Andrew Burrows, 'The Influence of Comparative Law on the English Law of Obligations', ch 2 of this volume.

as possible the same'.¹⁶ As late as 1972, Lord Hailsham LC remarked in *Cassell & Co Ltd v Broome*, a decision of the House of Lords: 'I view with dismay the doctrine that the common law should differ in different parts of the Commonwealth'.¹⁷

It is worth observing that this understanding—that there was (and should be) a single common law throughout the world—was closely associated with the declaratory theory of the common law. According to this theory, which held a firm grip on the minds of jurists in earlier times, the common law had existed since time immemorial and the role of judges was simply to declare its content. The common law, on this account, did not change, and judges certainly did not make the common law. When the courts departed from previous authority, the common law was simply being correctly re-expressed. Of course, there are few judges or scholars who these days place any faith in this theory.¹⁸ The declaratory theory was famously dismissed by Lord Reid in 1972 as a 'fairy tale'.¹⁹ The view that there was but a single common law throughout the world was connected with the declaratory theory. The possibility that the common law might be different in different jurisdictions would have sat most uncomfortably with that theory.

It is important to understand exactly how the fact that the Privy Council was the ultimate appellate court for several jurisdictions had a powerful unifying effect on the law throughout the common law world. The dominant view regarding the precedential status of the Privy Council's decisions is that they have binding force not only in the jurisdiction from which a given appeal comes, but in all jurisdictions from which the Privy Council hears appeals.²⁰ So, if the Privy Council settles the law as being X on an appeal from jurisdiction Y, X is the law not only in jurisdiction Y but in all jurisdictions from which an appeal to the Privy Council lies. The Privy Council, when its overseas jurisdiction was at its zenith, thus contributed greatly to uniformity in the law throughout the common law world. By a single decision, the Privy Council would lay down the law for a great many jurisdictions, including, arguably, Britain.²¹

The dissolution of the British Empire and its replacement by the Commonwealth witnessed the removal of the Privy Council as the final court of appeal for many jurisdictions.

¹⁶ *Trimble v Hill* (1879) 5 App Cas 342 (PC (Aust)), 345. Similarly, in *Wright v Wright* (1948) 77 CLR 191, 210 Dixon J wrote: 'For myself, I have in the past regarded it as better that this Court should conform to English decisions which we think have settled the general law in that jurisdiction than that we should be insistent on adhering to reasoning which we believe to be right but which will create diversity in the development of legal principle. Diversity in the development of the common law (using that expression not in the historical but in the very widest sense) seems to me to be an evil. Its avoidance is more desirable than a preservation here of what we regard as sounder principle'. In the instant case, however, Dixon J felt that it was impossible to determine what the law of England was due to conflicting cases, with the result that he felt that it was appropriate for the High Court to adhere to one of its earlier decisions rather than to a decision of the English Court of Appeal.

¹⁷ *Cassell & Co Ltd v Broome* (1972) AC 1027 (HL), 1067.

¹⁸ For a recent re-interpretation and defence of the declaratory theory, see A Beever, 'The Declaratory Theory of Law' (2013) 33 *OJLS* 421.

¹⁹ Lord Reid, 'The Judge as Lawmaker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22.

²⁰ The High Court of Australia in *Morris v English, Scottish and Australian Bank* (1957) 97 CLR 624 and the New Zealand Court of Appeal in *Bruer v Wright* [1982] NZLR 77 (CA) thought that they were bound by all Privy Council decisions, including decisions on appeals emanating from other jurisdictions. In contrast, the Ontario Court of Appeal held in *Negro v Pietro's Bread Co Ltd* [1933] 1 DLR 490 (Ont CA) that it was bound only by decisions of the Privy Council brought on appeal from Canadian courts.

²¹ Regarding the status of Privy Council decisions in Britain, see Lord Wright, 'Precedents' (1942) 8 *CLJ* 117, 135–36.

The precise process by which this transition occurred, which has a long history,²² differed from jurisdiction to jurisdiction. The details are complex, and not terribly relevant for present purposes. It will suffice to make some very general remarks. In the case of Australia, the process of limiting appeals to the Privy Council was a protracted one lasting many decades.²³ It culminated with the enactment of the Australia Act 1986 (UK) and the Australia Act 1986 (Cth),²⁴ which, save for a merely theoretical possibility of appeals to the Privy Council on certain constitutional issues,²⁵ resulted in the complete termination of appeals from Australia. The process in relation to Canada was similarly tortuous.²⁶ Criminal appeals to the Privy Council were eliminated in 1933. Civil appeals to the Privy Council were ended in 1949, although appeals remained permissible in cases in which proceedings were commenced before this date. In 2003, the Supreme Court of New Zealand replaced the Privy Council as the ultimate appellate court for New Zealand.²⁷ A great many other jurisdictions have now also abolished the right to appeal to the Privy Council. As to the scale of the decline in the Privy Council's jurisdiction, one recent study observes that, at the start of the twentieth century, 25 per cent of the world's population was subject to the Privy Council's jurisdiction while today that figure has dwindled to just 0.1 per cent.²⁸ The Privy Council's jurisdiction 'has been reduced to a shadow of its earlier self'.²⁹

Where the Privy Council has been replaced by a national court of final appeal, that national court of appeal has ultimate responsibility for the development of the law in the jurisdiction in question. Final national courts are not bound by either prior or subsequent decisions of the Privy Council.³⁰ This is because it is thought that it would be inappropriate for such a court to observe the decisions of the Privy Council given that the Privy Council could no longer correct what might be thought to be an incorrect decision of the national court. The freeing of many jurisdictions from the yoke of the Privy Council afforded their courts increased freedom to develop the common law in the direction that they saw fit. This development was a critical step in the process of jurisdictional isolation.

²² As long ago as 1923, Viscount Haldane wrote that the Privy Council was 'a disappearing body': Lord Haldane, 'The Work for the Empire of the Judicial Committee of the Privy Council' (1923) 1 *CLJ* 143, 154.

²³ See, generally, A Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Sydney, Federation Press, 2010).

²⁴ These Acts abolished appeals to the Privy Council from State courts. Appeals in federal matters had been abolished by the Privy Council (Limitation of Appeals) Act 1968 (Cth) and appeals from the High Court were ended by the Privy Council (Appeals from the High Court) Act 1975 (Cth).

²⁵ The High Court of Australia is empowered by s 74 of the Australian Constitution to issue a certificate that permits an appeal to the Privy Council on select constitutional matters. This power has only been exercised once, in *Colonial Sugar Refining Co v The Commonwealth* (1912) 15 CLR 182. The High Court has indicated that this certificate will never again be granted: *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* (1985) 159 CLR 461, 464–65.

²⁶ The details are given in MJ Herman, 'The Founding of the Supreme Court of Canada and the Abolition of the Appeal to the Privy Council' (1976) 8 *Ottawa Law Review* 7, 23–31; A Roland, 'Appeals to the Judicial Committee of the Privy Council: A Canadian Perspective' (2006) 32 *Commonwealth Law Bulletin* 569.

²⁷ Supreme Court Act 2003 (NZ), s 42.

²⁸ D Clarry, 'Institutional Judicial Independence and the Privy Council' (2014) 3 *Cambridge Journal of International and Comparative Law* 46, 48–51.

²⁹ Keith, above n 14, 316.

³⁰ See *Viro v R* (1978) 141 CLR 88, 92–94; *Reference re Agricultural Products Marketing* [1978] 2 SCR 1198, 1256–67; *China Field Ltd v Appeal Tribunal (Buildings)* (2009) 12 HKCFAR 68 [79]–[81].

Reduced Precedential Force of British Authority

Intimately related to the termination of appeals from many jurisdictions to the Privy Council is the marked weakening in the precedential force of domestic British authority as a source of law outside of the United Kingdom. When the overseas jurisdiction of the Privy Council was in its heyday, the prevailing view was that the decisions of the House of Lords were effectively binding on the courts overseas.³¹ The qualifier ‘effectively’ appears in the previous sentence in recognition of the fact that because the House of Lords was part of the judicial system of the United Kingdom only, its decisions were not strictly speaking binding on courts other than those in the United Kingdom.³² However, for all intents and purposes, in earlier times, the position was that decisions of both the Privy Council *and* the House of Lords were binding in jurisdictions that were subject to the Privy Council’s authority. A clear statement to this effect can be found in *Piro v W Foster & Co Ltd*.³³ In this case, Latham CJ said that although the High Court of Australia is not ‘technically bound by a decision of the House of Lords’, it:³⁴

and other courts in Australia should as a general rule follow decisions of the House of Lords. The House of Lords is the final authority for declaring English law, and where a case involves only principles of English law which admittedly are part of the law of Australia, and there are no relevant differentiating local circumstances, the House of Lords should be regarded as finally declaring the law. ... In my opinion it should now be formally decided that it will be a wise general rule of practice that in cases of clear conflict between a decision of the House of Lords and of the High Court, this Court, and other courts in Australia, should follow a decision of the House of Lords upon matters of general legal principle.

Another well-known statement along the same lines is that of Viscount Dunedin in *Robins v National Trust Co Ltd*.³⁵ Lord Dunedin stated:³⁶

when an appellate Court in a colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it.

The fact that decisions of not only the Privy Council but also (if not *de jure* then certainly *de facto*) the House of Lords had precedential force tended to add to the uniformity in the common law that was achieved by virtue of the Privy Council’s overseas jurisdiction.

Decisions of the Privy Council were of course binding because that court formed part of the judicial hierarchy of overseas jurisdictions. Decisions of the House of Lords were regarded as binding for a different reason, namely, the fact that the composition of the Appellate Committee of the House of Lords and of the Judicial Committee of the Privy

³¹ Comments can be found to the effect that decisions of the English Court of Appeal were binding too: see, eg, *Waghorn v Waghorn* (1942) 65 CLR 289, 292–93.

³² Wright, above n 21, 135–36.

³³ *Piro v W Foster & Co Ltd* (1943) 68 CLR 313.

³⁴ *ibid* 320. Parallel remarks were made by all of the other members of the Court: Rich J (at 325–26), Starke J (at 326–27), McTiernan J (at 335–36) and Williams J (at 340–42).

³⁵ *Robins v National Trust Co Ltd* [1927] AC 515 (PC (Can)).

³⁶ *ibid* 519. See also *Stuart v Bank of Montreal* (1909) 41 SCR 516, 548 (‘A decision of the House of Lords should ... be respected and followed though inconsistent with a previous judgment of this court’).

Council were substantially the same.³⁷ As a result of the largely common membership of the two courts, the law enunciated by the Privy Council tended to be the same as that adumbrated by the House of Lords. So courts in jurisdictions that were subject to the authority of the Privy Council could be reasonably confident that a pronouncement of the House of Lords would be followed by the Privy Council. It was thus necessary for them to proceed 'with one eye on the prevailing English case law on the subject'.³⁸

The status in many parts of the Commonwealth, and certainly in those parts that had terminated appeals to the Privy Council, of decisions of the House of Lords changed significantly around the middle of the twentieth century. The general view that emerged was that its decisions were no longer binding, at least not on final national courts of appeal. A notable decision in this sea change is *Parker v The Queen*.³⁹ In this case, decided in 1963, the High Court of Australia refused to follow the decision of the House of Lords in *DPP v Smith*.⁴⁰ Dixon CJ, speaking for the court on this point, said:⁴¹

Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's* case I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment ... which I could never bring myself to accept ... I think *Smith's* case should not be used as authority in Australia at all.

This retreat from the view that British authority had precedential force in Australia continued in *Uren v John Fairfax & Son Pty Ltd*.⁴² In that case, the Australian High Court unanimously refused to follow the decision of the House of Lords in *Rookes v Barnard*, in which the House had famously severely restricted the availability of exemplary damages.⁴³ McTiernan J remarked: 'A decision of the House of Lords is not as a matter of law binding on this Court'.⁴⁴ Owen J, expanding on comments that he had made in an earlier matter,⁴⁵ opined:⁴⁶

if the High Court comes to a firm conclusion that a decision of the House of Lords is wrong it should act in accordance with its own view ...; and ... where a conflict exists between a decision of the High Court and one of the House of Lords I am of opinion that other Australian courts should follow the decision of this court.

³⁷ '[T]he board of the Privy Council is drawn practically from the same judges who take part in the judicial sittings of the House of Lords': Lord Wright, 'Precedents' (1942) 8 *CLJ* 118, 135.

³⁸ WMC Gummow, 'The High Court of Australia and the House of Lords (1903–2003)' in G Doeker Mach and KA Ziegert (eds), *Law, Legal Culture and Politics in the Twenty First Century* (Stuttgart, Franz Steiner Verlag, 2004) 44.

³⁹ *Parker v The Queen* (1963) 111 CLR 610.

⁴⁰ *DPP v Smith* (1961) AC 290 (HL).

⁴¹ (1963) 111 CLR 610, 632 (footnotes omitted). The New Zealand counterpart to this development is *Bognuda v Upton & Shearer Ltd* [1972] NZLR 741 (CA). As a side note, *Smith* did not survive in the United Kingdom. Parliament departed from it in s 8 of the Criminal Justice Act 1967 (UK) and the Privy Council later held that it did not represent the common law: *Frankland v The Queen* [1987] AC 576 (PC (Isle of Man)), 594.

⁴² *Uren v John Fairfax & Son Pty Ltd* (1966) 117 CLR 118. For a longer treatment of this case and associated decisions, see JR Leane, 'Stare Decisis, Judicial Policy and Punitive Damages' (1986) 6 *Sydney Law Review* 111.

⁴³ *Rookes v Barnard* [1964] AC 1129 (HL). The law as stated in *Rookes v Barnard* has also been rejected in Canada: *Vorvis v Insurance Corp of British Columbia* [1989] 1 SCR 1085.

⁴⁴ *Uren v John Fairfax & Son Pty Ltd* (1966) 117 CLR 118, 122.

⁴⁵ *Skelton v Collins* (1966) 115 CLR 94, 138.

⁴⁶ *Uren v John Fairfax & Son Pty Ltd* (1966) 117 CLR 118, 161 (footnote omitted).

In *Australian Consolidated Press v Uren*,⁴⁷ the High Court affirmed the departure from *Rookes v Barnard*. On appeal to the Privy Council, their Lordships said that the High Court was entitled not to follow *Rookes v Barnard*.⁴⁸ Significantly, their Lordships appeared to suggest that local judges, in at least certain legal contexts, are best positioned to decide the legal destiny of their respective jurisdictions.⁴⁹

This reduction in the precedential force of decisions of the House of Lords in relation to Australia has occurred in many other common law jurisdictions. The details are given elsewhere.⁵⁰ It is unnecessary to delve into them here, for the critical point to grasp for present purposes is that the fact that decisions of the House of Lords are no longer binding in Commonwealth jurisdictions, at least in those jurisdictions that have terminated appeals to the Privy Council, has played an important role in facilitating jurisdictional isolation.

Reduced Deference to British Authority

Another, related factor that has led to jurisdictional isolation is that of reduced deference to British authority. Historically, judges in many Commonwealth jurisdictions placed special emphasis on British authority even when they were not formally bound by it. For example, Kitto J in *Skelton v Collins*, after arguing that the High Court of Australia was not bound by decisions of the House of Lords, nonetheless wrote that the High Court:⁵¹ 'has always recognised [the] particularly high persuasive value [of decisions of the House of Lords]'. This approach had a certain unifying effect on the law throughout the common law world. However, this deferential attitude waned over time. It is generally true to say that, today, the persuasiveness of the reasoning of a particular decision, rather than the jurisdiction from which it emanated, determines the extent to which courts in other jurisdictions will have recourse to it.⁵² This attitude is visible in, for example, the following extra-curial remark made by Sir Anthony Mason, then the Chief Justice of Australia, in 1987:⁵³

There is ... every reason why we should fashion a common law for Australia that is best suited to our conditions and circumstances. In deciding what is law in Australia we should derive such assistance as we can from English authorities. But this does not mean that we should account for every English judicial decision as if it were a decision of an Australian court. The value of English judgments, like Canadian, New Zealand and for that matter United States judgments depends on the persuasive force of their reasoning.

⁴⁷ *Australian Consolidated Press v Uren* (1966) 117 CLR 185.

⁴⁸ *Australian Consolidated Press v Uren* [1969] 1 AC 590 (PC (Aust)), 644.

⁴⁹ For clear statements to this effect, see *Geelong Harbor Trust Commissioners v Gibbs Bright & Co* [1974] AC 810 (PC (Aust)), 819; *Jamil bin Harun v Yang Kamsiah BTE Meor Rasdi* [1984] AC 529 (PC (Malaysia)), 535, 538; *Hart v O'Connor* [1985] AC 1000 (PC (NZ)), 1017.

⁵⁰ In relation to Canada, see RJ Sharpe, 'Canada' in L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords 1876–2009* (Oxford, OUP, 2009) ch 19(b), where Justice Sharpe describes the transition from what he calls 'the era of obedience' to 'the era of persuasion'. The story with respect to New Zealand is set out in MD Kirby, 'Australia and New Zealand' in L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords 1876–2009* (Oxford, OUP, 2009) 347–50.

⁵¹ *Skelton v Collins* (1966) 115 CLR 94, 104.

⁵² cf the view of JW Harris, who wrote that in 1990, 'perhaps, even today, English decisions have a special primacy' in Commonwealth jurisdictions: JW Harris, 'The Privy Council and the Common Law' (1990) *LQR* 574, 588.

⁵³ A Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 154.

A similar statement has been made by Justice Robert Sharpe in relation to Canada. Speaking extra-judicially, Justice Sharpe wrote:⁵⁴

Canadian courts continue to look to the House of Lords for authoritative statements of common law principle, but have adopted a more eclectic approach [than in the past], often citing the decisions of other non-Canadian courts ... English jurisprudence is no longer accorded automatic precedence, and its acceptance rests entirely upon its persuasiveness.

The increased willingness of Commonwealth courts to look other than to the jurisprudence of British courts for inspiration has diminished the unifying effect on the law to which the previous deferential approach contributed.

Judicial Parochialism

In some jurisdictions, judges have tended towards parochialism. The result of this tendency has been, at least to some degree, to cut off the jurisdiction in question from the rest of the legal universe. By far the most striking illustration of this phenomenon concerns the United States. As is well known, US judges refer almost exclusively to domestic legal sources, with the result that the United States is an exporter of law and not an importer.⁵⁵ There is a fairly widely held belief among the judiciary in the United States that it is inappropriate to take cognisance of materials from other jurisdictions, especially in certain contexts, such as that of constitutional interpretation.⁵⁶ A key reason why many judges in the United States tend to focus almost exclusively on domestic sources concerns the sheer scale on which judicial authority is produced in that country. It is difficult enough for judges to master the domestic authorities given their number, and they are hence understandably reluctant to add to their workload by making frequent recourse to foreign sources. As one commentator has put it, 'judges from other American state jurisdictions have often provided such an abundance of authority on common law issues ... that reference to non-American authority has been unnecessary'.⁵⁷ Another reason for the insular attitude that exists in the United States is that comparative insights are readily available from jurisdictions that are internal to the United States. A judge sitting in, say, New York is able to look to how his or her fellow judges are proceeding in, say, California. However, the motivations of the US judiciary for putting itself into self-imposed exile are unimportant for present purposes. What matters is the fact that the judiciary in that country has substantially isolated itself from the rest of the common law world.

Judges in other major common law jurisdictions freely and frequently have recourse to foreign sources. It might be thought, therefore, that parochialism has extended only to the United States. It is impossible justifiably to reach any firm conclusions in this connection,

⁵⁴ Sharpe, above n 50, 355.

⁵⁵ Judges in other jurisdictions not infrequently have recourse to US authority. See, eg, Andrew Burrows, 'The Influence of Comparative Law on the English Law of Obligations', ch 2 of this volume, regarding the use made by the House of Lords and UK Supreme Court of US authorities.

⁵⁶ See the sources cited in RJ Delahunty and J Yoo, 'Against Foreign Law' (2005) 29 *Harvard Journal of Law and Public Policy* 291, 294–95.

⁵⁷ PE von Nessen, 'The Use of American Precedents by the High Court of Australia, 1901–1987' (1992) 14 *Adelaide Law Review* 181, 183–84.

at least without engaging in a further, very different kind of research project. For what it is worth, however, our feeling is that foreign sources are much less influential in many jurisdictions than is commonly thought. It is undeniable that judges in many parts of the common law world regularly cite foreign sources. But this fact does not mean that these sources have a significant or, indeed, any influence on the outcomes of decisions or the reasoning employed therein. Arguably, citations of foreign legal materials are to a large degree ornamental. On this view, judges canvass sources of law in other jurisdictions merely or mainly, for example, out of concern for judicial comity or to create the impression that all of the main angles to a given legal problem have been considered. If this is correct, judicial parochialism might be more widespread than is commonly thought, with important implications for jurisdictional isolation.

Harmonisation of Legal Systems with Different Legal Traditions

The previous section dealt with insular attitudes on the part of judges, which can contribute to the isolation of a jurisdiction. Paradoxically, a willingness of judges to look beyond the confines of their jurisdiction for inspiration can also contribute to isolation. A good illustration of this concerns the United Kingdom. It is probably fair to say that judges in the United Kingdom refer to a greater degree today than they did in the past to European sources of law.⁵⁸ This tendency is due at least partly to the significant efforts that have been made to harmonise the law throughout the European Union.⁵⁹ It is arguable that the increased use by the British judiciary of European sources of law has tended to make their decisions less relevant to other common law jurisdictions than might have otherwise been the case. So while the United Kingdom might be less isolated from continental jurisdictions than in former times, efforts to harmonise the law across the European Union have tended to isolate the United Kingdom from other common law jurisdictions.

Growth of Legislation

There are two central points that are worth making about legislation and isolationism. The first is that there has been a lack of source unity in terms of legislation from a relatively early stage. The reign of the British Imperial Parliament has long since come to an end, and legislatures in most common law jurisdictions are now free to specify what the law is within their respective domains, subject to local constitutional constraints. The second point concerns the rise of legislation as a source of law. As is well known, the way in which law is made has changed dramatically in the last 150 years or so throughout the common law world. Historically, the courts assumed the main responsibility for ensuring that lacunae in the law were filled and that the law served the needs of the day. The bulk of the law was,

⁵⁸ See Andrew Burrows, 'The Influence of Comparative Law on the English Law of Obligations', ch 2 of this volume.

⁵⁹ The main work in this respect in so far as the law of torts is concerned has been done by the European Group on Tort Law, the Study Group on a European Civil Code and the Joint Network on European Private Law. For details of their various projects, see P Giliker, *The Europeanisation of English Tort Law* (Oxford, Hart Publishing, 2014) 198–202.

in other words, judge-made, and the legislature was the lesser partner in the law-making enterprise. This state of affairs has been dramatically reversed. The legislatures in at least all major common law jurisdictions are now by far the dominant producers of law. Guido Calabresi encapsulated the transition from a world of primarily judge-made law to a world of statutory law in his now well-worn remark that we live ‘in the age of statutes’.⁶⁰ The rise of legislation as a source of law has profoundly affected, of course, the law of torts,⁶¹ a fact that has not been properly recognised by many tort scholars.⁶² The reasons for this role reversal are irrelevant for present purposes. What matters is the fact that it has occurred. It is a significant development because nowadays, many decisions are set against a distinctive statutory backdrop, with the result that they are less relevant to judges in other jurisdictions than might otherwise have been the case. This contributes, of course, to isolationism.

IV. Jurisprudential Divergence

The previous section described how the major common law jurisdictions have become increasingly isolated from each other. Law-makers (including judges) in these jurisdictions are now masters of their own legal destinies, subject to local political, constitutional and cognate constraints. We now show that the ability of law-makers to determine their own legal fate has enabled them to adapt tort law in response to domestic pressures. We consider a selection of such pressures here and the impact that they have had. The purpose of this analysis is not so much to show that the systems of tort law in common law jurisdictions have drifted apart from each other. Everyone knows that there is significant divergence. Rather, the aim is to continue the story that has been told to this point, namely, that jurisdictional isolation has permitted jurisprudential divergence in the law of torts.

Constitutional Arrangements and International Human Rights Commitments

A jurisdiction’s particular constitutional arrangements and human rights obligations can influence the trajectory of tort law within that jurisdiction and cause it to diverge significantly from that found elsewhere. Several areas of tort law seem to be especially susceptible to such influences. We consider some of these below.

Defamation

A clear example of constitutional arrangements influencing the development of tort law concerns the First Amendment to the United States Constitution and the law of defamation.⁶³

⁶⁰ G Calabresi, *A Common Law for the Age of Statutes* (Cambridge, MA, Harvard University Press, 1985).

⁶¹ See Goudkamp and Murphy, ‘Tort Statutes and Tort Theories’, above n 12.

⁶² Arvind and Steele justifiably complain that ‘legislation tends to be left at the periphery of the subject, either unconsciously, or deliberately’: TT Arvind and J Steele, ‘Introduction: Legislation and the Shape of Tort Law’ in TT Arvind and J Steele (eds), *Tort Law and the Legislature* (Oxford, Hart Publishing, 2013) 2.

⁶³ The First Amendment states: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances’.

In *New York Times v Sullivan*,⁶⁴ the US Supreme Court decided that the existing defences to liability in defamation did not adequately secure the constitutional free-speech guarantee. Accordingly, it crafted new exclusionary rules applicable where the person defamed is a public official. The main change made was to prevent public officials from recovering 'damages for a defamatory statement unless [the public official concerned proved] that it was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not'.⁶⁵ Crucially for present purposes, the Supreme Court made it clear that it was changing the law because of the First Amendment, a unique local factor. The Court stressed its 'commitment to the principle that debate on public issues should be uninhibited'⁶⁶ principally on the ground that it was vital to the achievement of democratic accountability, a central constitutional value in the United States. Our point here, we stress, is not that the First Amendment somehow dictated that precisely this rule had to be developed (plainly, it made no such demand) but, rather, that the Supreme Court developed the law of defamation on account of the First Amendment.

In the United Kingdom, against the background of the European Convention on Human Rights (ECHR), and in anticipation of the introduction of Human Rights Act 1998 (UK), the House of Lords in *Reynolds v Times Newspapers Ltd*⁶⁷ crafted a defence (which subsequently became known as the 'Reynolds defence') that would be available in respect of statements on matters of public interest so long as those statements met the standard of responsible journalism.⁶⁸ The *Reynolds* defence was created in order to give greater weight in English defamation law to the right to freedom of expression enshrined in Article 10 of the ECHR. Judicial acknowledgement of the impact of the ECHR in this regard was supplied by Lord Phillips P in *Flood v Times Newspapers Ltd*. His Lordship stated that 'British courts ... developed the defence of public interest privilege under the influence of principles laid down in the European Court of Human Rights'.⁶⁹ It is important to note that the House of Lords in *Reynolds* developed English law differently from the way in which the US Supreme Court in *Sullivan* changed the law of defamation in the United States. The difference in the legal solutions adopted is partly attributable to the fact that Article 10 of the ECHR grants a much more qualified right to freedom of expression than exists in the United States.⁷⁰ Sedley LJ captured the difference in this way: 'Where rights to reputation and privacy have wilted somewhat in the bright light of First Amendment jurisprudence, the English common law, now reinforced by the [ECHR], seeks to hold the two in a sometimes difficult balance, calibrated by the concept of responsible journalism'.⁷¹ It is important to note that section 4 of the Defamation Act 2013 (UK) abolished the *Reynolds* defence and installed a new 'public interest' defence in its place. However, this new defence seems to

⁶⁴ *New York Times v Sullivan* 376 US 254 (1964).

⁶⁵ *ibid* 279–80.

⁶⁶ *ibid* 270.

⁶⁷ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL).

⁶⁸ Although the defence was described in *Reynolds* as one of 'responsible journalism', it was subsequently made clear that it was potentially applicable to publications by non-media company defendants in any medium: *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972, [2008] 1 All ER 750; *Seaga v Harper* [2008] UKPC 9, [2009] 1 AC 1.

⁶⁹ *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 AC 273 [138].

⁷⁰ See further M Tushnet, 'New York Times v Sullivan Around the World' (2014) 66 *Alabama Law Review* 337, 352–53.

⁷¹ *Roberts v Gable* [2007] EWCA Civ 721, [2008] QB 502 [75].

be identical to the *Reynolds* defence. The Explanatory Notes to the Act stated that the public interest defence is 'based on the existing common law defence established in *Reynolds*'.⁷² This understanding is reinforced by an examination of the parliamentary debates.⁷³ It is also shared by other writers.⁷⁴

The law of defamation elsewhere has also been developed in unique ways due to constitutional influences. The High Court of Australia in *Lange v Australian Broadcasting Corporation*⁷⁵ recognised an implied freedom of political communication derived from aspects of the Federal Constitution providing for a system of representative democracy. According to the High Court, this implied freedom required the defence of qualified privilege to be extended to cover defamatory statements concerning 'government and political matters'. The extended privilege (the *Lange* privilege) is conditional upon the publisher of the statement having acted reasonably in publishing the statement. The key difference between the *Lange* privilege and the *Reynolds* defence is that the former is limited to political statements whereas the latter is not. This difference can be explained in part by reference to different influences at play in each jurisdiction. Freedom of political communication is an implicit constitutional liberty in Australia. There is no equivalent in Australia to Article 10 of the ECHR (recognising a more general right to freedom of speech) which, as noted earlier, underscores the *Reynolds* defence.

Different, again, are the relevant developments in New Zealand. In the leading case of *Lange v Atkinson* the New Zealand Court of Appeal crafted a narrow defence confined to 'statements which directly concern the functioning of representative and responsible government'.⁷⁶ Ostensibly, this defence bears some similarity to the *Lange* privilege in Australia. However, there is an important difference between the two defences, for the New Zealand Court of Appeal declined to follow the Australian lead of qualifying the defence with a reasonableness requirement. The case went to the Privy Council.⁷⁷ The Judicial Committee remitted the matter to the Court of Appeal for a further hearing and invited the Court to reconsider its first decision in the light of *Reynolds*. However, the Court of Appeal declined to depart from its earlier statement of the law.⁷⁸ Anthony Lester described the second decision of the Court of Appeal as follows:⁷⁹

[The Court of Appeal] found the constitutional air of New Zealand too pure to be contaminated by uncertain English common law restrictions on political expression ... When diplomatically explaining its reasons for departing from the English law, the Court of Appeal referred to differences between the New Zealand and the United Kingdom constitutional structures.

In Canada, a development along the lines of the decision in *Sullivan* was rejected, with the Supreme Court remarking that '[n]one of the factors which prompted the United States

⁷² Defamation Act 2013 (UK), Explanatory Notes [29].

⁷³ During the Committee stage in the House of Lords, Lord McNally, then the Minister for Justice, suggested that 'in determining whether in all the circumstances the test is met, we would expect the courts to look at many of the same sorts of considerations as they have done before': (HL Deb 741, col GC534, 19 December 2012).

⁷⁴ See, eg, M Jones (ed), *Clerk and Lindsell on Torts* (London, Sweet and Maxwell, 2014) 1264.

⁷⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁷⁶ *Lange v Atkinson* [1998] 3 NZLR 424 (CA), 467.

⁷⁷ *Lange v Atkinson* [2000] 1 NZLR 257 (PC (NZ)).

⁷⁸ *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

⁷⁹ A Lester, 'The Magnetism of the Human Rights Act 1998' (2002) 33 *Victoria University of Wellington Law Review* 53, 53–54.

Supreme Court to re-write the law of defamation in America are present in the case at bar.⁸⁰ Subsequently, in *Grant v Torstar Corp*,⁸¹ the Supreme Court recognised a defence of responsible communication on matters of public interest. It is somewhat similar to the *Reynolds* defence. Significantly, however, it was crafted in order to render Canadian defamation law consistent with the particular values embodied in the Canadian Charter of Rights and Freedoms rather than to keep step with developments in the United Kingdom or elsewhere. So, although in the instant case there was a significant trawl of the case law throughout the Commonwealth, the Supreme Court ultimately held that the most important impetus for change derived from the fact that, as it presently stood, Canadian defamation law did not afford sufficient weight to the Charter value of freedom of expression. McLachlin CJ (speaking for the Court) said that the 'common law defence of qualified privilege should be expanded to comply with Charter values'.⁸²

Privacy

Privacy is a second area in which constitutional guarantees and human rights commitments have resulted in the differential development of tort law in the major common law jurisdictions. In the United Kingdom, there is no general tort of invasion of privacy.⁸³ However, privacy nonetheless receives some direct protection in the form of the tort of misuse of private information.⁸⁴ This tort, which is an offshoot of the equitable wrong of breach of confidence, was welcomed into English tort law by the seminal House of Lords' case of *Campbell v MGN Ltd*.⁸⁵ Its elements are (1) the information in question must have been of a private nature; (2) the information must have been disclosed in circumstances where the defendant knew or ought to have known that the claimant reasonably expected the information to remain private; and (3) it must not have been more important that the defendant be free to disclose the information than that it remain private.⁸⁶ Even the most cursory reading of the opinions in *Campbell* reveals that the ECHR was at the forefront of the Law Lords' minds.⁸⁷ The elements of the tort, and the third element in particular, clearly reflect the influence of Article 8 (protecting the right to privacy) and Article 10 (protecting the right to free speech).

In Australia, there is no constitutional guarantee against invasions of privacy or human rights instruments comparable to the ECHR. It is unsurprising, therefore, that the protection that Australian tort law gives to privacy interests is essentially the same as the protection conferred by English tort law prior to the incorporation of the ECHR into domestic law. An unsuccessful attempt to augment tort law's protection of privacy interests was made

⁸⁰ *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 [139].

⁸¹ *Grant v Torstar Corp* [2009] SCC 61, [2009] 3 SCR 640.

⁸² *ibid* [142].

⁸³ *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406.

⁸⁴ Beyond the direct protection afforded by this action, tort law has long since protected privacy indirectly via an array of other torts such as private nuisance, trespass to land and the action under the Protection from Harassment Act 1997 (UK).

⁸⁵ *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

⁸⁶ *ibid* [92]–[100] (Lord Hope).

⁸⁷ We are not alone in reading the case in this way. McBride and Bagshaw, for example, argue that '[t]he most important influence on the development of the new tort has been, and remains, the right to privacy contained in Article 8 of the European Convention': NJ McBride and R Bagshaw, *Tort Law*, 4th edn (Harlow, Pearson, 2012) 592.

in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.⁸⁸ In this case, the High Court of Australia strictly only ruled out the possibility of corporate entities relying on a privacy-based tort. But the general tenor of the decision was also against the development of a privacy-based tort for human claimants. Accordingly, in its recent summary of the present state of the law in Australia, the Australian Law Reform Commission concluded that '[a] common law tort for invasion of privacy has not yet developed in Australia'.⁸⁹

The law in New Zealand is different again. In that country there is a 'tort covering the invasion of personal privacy'.⁹⁰ The elements of this tort, according to the landmark decision in *Hosking v Runting*, are (1) the existence of facts in respect of which there is a reasonable expectation of privacy; and (2) publicity given to those facts which is highly offensive according to an objective standard.⁹¹ This is a more expansive action than its English counterpart, primarily because its elements may be satisfied even where the defendant has acted reasonably. Gault P, who delivered the main opinion in *Hosking*, was mindful of New Zealand's human rights commitments. After making the general point that '[t]he legislative landscape is important'⁹² he wrote that, 'when enacting the Bill of Rights Act to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights Parliament did not include among the provisions affirming specific rights and freedoms a provision corresponding to article 17 of the Covenant'.⁹³ In essence, that article contains a guarantee against arbitrary or unlawful interference with a person's privacy. Because the Bill of Rights Act 1990 (NZ) was silent on the right to privacy in spite of New Zealand being party to the International Covenant, Gault P thought it fell to the courts to develop the common law so as to honour New Zealand's commitment to Article 17.

It is worth noting that, more recently, the New Zealand courts have also recognised a tort of intrusion upon seclusion.⁹⁴ The elements of this tort are (1) an intentional and unauthorised intrusion; (2) upon seclusion; (3) involving the infringement of a reasonable expectation of privacy; and (4) in circumstances where the invasion would be highly offensive to a reasonable person.⁹⁵ In the foundational case, it was held that these elements were present where the defendant had spied on the claimant while she was showering. Again, this tort was developed on account of essentially the same local considerations that prompted the Court of Appeal in *Hosking* to recognise the tort of invasion of personal privacy.⁹⁶ It is clear that this tort, which involves the defendant *acquiring* information about the claimant, rather than misusing information that is already in the defendant's possession, offers protection that goes substantially beyond that which exists in the United Kingdom.

The protection of privacy under Canadian tort law has also largely been driven by local human rights guarantees. In the recent and leading case of *Tsige v Jones*, Sharpe JA (delivering the reasons of the Ontario Court of Appeal) noted '[t]he explicit recognition of a right to privacy as underlying specific Charter rights and freedoms'.⁹⁷ His Honour then argued

⁸⁸ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199.

⁸⁹ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Report 123, 2014) [3.53].

⁹⁰ *Hosking v Runting* [2004] NZCA 34, [2003] 3 NZLR 385 [79].

⁹¹ *ibid* [117].

⁹² *ibid* [91].

⁹³ *ibid*.

⁹⁴ *C v Holland* [2012] 3 NZHC 2155, [2012] 3 NZLR 672.

⁹⁵ *ibid* [94].

⁹⁶ See, eg, the references to New Zealand's international obligations at *ibid* [67] n 93.

⁹⁷ *Tsige v Jones* [2012] ONCA 32, (2012) 108 OR (3d) 241 [46].

that 'the principle that the common law should be developed in a manner consistent with Charter values supports the recognition of a civil action for damages for intrusion upon the plaintiff's seclusion'.⁹⁸ Importantly, however, he also noted that the privacy right in the Charter should be understood as including a right to seclusion that was rather different from the one in New Zealand. What the case minted was a cause of action that lies where a defendant gains unauthorised access to a claimant's private personal records (such as the bank account, in this case). Obviously, this differs significantly from the New Zealand tort of intrusion upon seclusion. It also differs from both the New Zealand tort of invasion of personal privacy and the English tort of misuse of private information, since both of those torts require the dissemination of private information.

In the United States, the protection of privacy by tort law is of very considerable vintage.⁹⁹ The *Restatement (Second) of the Law of Torts* recognises four privacy torts: (1) unreasonable intrusion upon seclusion; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public.¹⁰⁰ This understanding of the law was endorsed by the US Supreme Court in *Cox Broadcasting Corp v Cohn*,¹⁰¹ and some of these torts have been shaped by the United States Constitution. In *Cohn* itself, the third of these torts was in issue. A television company (and a reporter employed by it) were sued by the father of a 17-year-old rape victim for publishing his daughter's name. The reporter had obtained the daughter's name in open court. The father argued, relevantly, that in publishing his daughter's name his right to privacy had been violated. By way of defence, the company argued, among other things, that granting the action would infringe the First Amendment.¹⁰² This argument was accepted by a majority of the Court. White J stated that it was constitutionally impermissible for a State to 'impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection'.¹⁰³ The scope of the tort of unreasonably giving publicity to another's private life consequently had to be restricted. Leaving *Cohn* to one side, it is also notable that the United States Constitution has also influenced the first-mentioned privacy tort, which is concerned with the right to seclusion. In *Olmstead v United States*, Brandeis J, having recognised 'the right to be let alone' stated that 'every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment'.¹⁰⁴ We offer no comment on the merits of these developments, which are irrelevant for present purposes. We confine ourselves to the observation that these constitutional concerns have influenced the law of privacy in the United States in a unique way.

⁹⁸ *ibid.* For further analysis, see T Bennett, 'Privacy, Corrective Justice, and Incrementalism: Legal Imagination and the Recognition of a Privacy Tort in Ontario' (2013) 59 *McGill Law Journal* 49.

⁹⁹ SD Warren and LD Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193 is often regarded as marking the beginning of the field.

¹⁰⁰ At § 652A.

¹⁰¹ *Cox Broadcasting Corp v Cohn* 420 US 469, 489 (1975).

¹⁰² See above n 63.

¹⁰³ 420 US 469, 491 (1975).

¹⁰⁴ 277 US 438, 478 (1928). The Fourth Amendment states: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

Caps on Compensatory Damages

The influence of the constitutional arrangements on US tort law has not been confined to the areas of defamation or privacy. Those arrangements also constrain the freedom of State legislatures to cap compensatory damages. The relevant jurisprudence is on a vast scale, and it is both impossible and unnecessary to do more here than make a few brief observations.¹⁰⁵ Damages caps in the United States are widespread and are emblematic of modern tort reform efforts in that country. Sometimes, particular heads of damages are capped, such as damages for non-economic loss (as that category of damages is usually called in the United States).¹⁰⁶ On other occasions, caps exist on the total amount of damages.¹⁰⁷ Yet another variation is found in the form of caps on awards arising from a particular accident, irrespective of the number of claimants involved.¹⁰⁸ The constitutional validity of caps has been hotly contested and some caps have been struck down. For example, in *Ferdon v Wisconsin Patients Compensation Fund*,¹⁰⁹ the Supreme Court of Wisconsin held incompatible with Wisconsin's equal protection guarantees a cap on non-economic damages in medical malpractice cases. Similarly, in *Estate of McCall v United States*,¹¹⁰ the Florida Supreme Court found unconstitutional a cap on wrongful death non-economic damages recoverable in a medical malpractice suit. The Court held that the cap violated Florida's equal protection guarantee. The contrast with the experience in other common law jurisdictions is stark. Statutory caps on compensatory damages are commonplace in Australia, and have existed for decades.¹¹¹ However, none has ever been struck down on constitutional grounds. Indeed, to the best of our knowledge, no Australian court has even been invited to declare any statutory cap on damages constitutionally invalid. Equally, so far as we are aware, the informal caps on general damages for pain and suffering established in the Judicial Studies Board's *Guidelines for the Assessment of General Damages in Personal Injury Cases*¹¹² have raised no constitutional concerns in the United Kingdom. The same is true, as we understand it, of the judicially created caps on general damages that exist in Canada.¹¹³ In short, the unique constitutional considerations at play in the United States have created a distinct strand of tort law jurisprudence in relation to damages caps.

Reforms Resulting from Highly Publicised Legal Concerns

In all of the major common law jurisdictions, legislation has been enacted in the tort law context in response to pressing and highly publicised local concerns. Such legislation has

¹⁰⁵ An accessible introduction is JCP Goldberg, 'The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs' (2006) 115 *Yale Law Journal* 524, especially at 621–22.

¹⁰⁶ See, eg, Wis Stat §§ 655.017, 893.55(4)(d) (2001–2002).

¹⁰⁷ See, eg, Va Code Ann § 8.01-581.15 (2000).

¹⁰⁸ See, eg, Fla Stat § 766.118(2); Ind Code § 34-13-3-4.

¹⁰⁹ 284 Wis 2d 573, 701 NW 2d 440 (2005).

¹¹⁰ 134 So 3d 894 (Fla, 2014).

¹¹¹ See, eg, Civil Liability Act 2002 (NSW), s 12 (capping damages for a loss of earnings), s 16 (capping damages for non-economic loss).

¹¹² In *Wall v Mutuelle de Poitiers Assurances*, the quasi-statutory effect of these Guidelines was described by Longmore LJ in these terms: 'judges will tend to follow them. No doubt one can call this "soft law" rather than "hard law" but it is law nevertheless': [2014] EWCA Civ 138, [2014] 1 WLR 4263.

¹¹³ In a trilogy of cases decided in 1978, the Supreme Court of Canada imposed caps on compensatory damages for non-pecuniary loss: *Andrews v Grand & Toy Alberta Ltd* [1978] 2 SCR 229; *Arnold v Teno* [1978] 2 SCR 287; *Thornton v School Dist No 57 (Prince George)* [1978] 2 SCR 267.

often caused tort law in the jurisdiction in question to diverge radically from that which exists elsewhere. The prime example of such legislation is the Accident Compensation Act 1972 (NZ). This Act effected the most radical reform of the common law of torts ever to have been wrought by a single statute anywhere in the world. It provided for a no-fault solution to accidents and, in doing so, rendered tort law in New Zealand a much less expansive beast than any counterpart system of tort law. Its origins can be traced to a particular local concern. In the 1960s there was widespread dissatisfaction with the workers' compensation system then in place. That dissatisfaction led to the appointment of the Royal Commission. The Commission concluded that 'the workers' compensation legislation had been put forward on a wrong principle and had since been dominated by a wrong outlook'.¹¹⁴ Accordingly, the Commission recommended major changes. This recommendation, contained in the Commission's final report in 1967, provided the crucial impetus for the introduction of the 1972 Act. In short, it was primarily dissatisfaction with an existing local regime governing workers' compensation that prompted the enactment of the 1972 statute.

A similar story can be told of the far-reaching statutory reforms of tort law that occurred in Australia at the turn of the twenty-first century. The particular local concern that these reforms addressed was the 2001–02 'insurance crisis'. That crisis involved an exponential increase in premiums for liability insurance. The public outcry was deafening, and the crisis was headline news at the time. With remarkable speed (some might say too much speed), all Australian legislatures, operating on the assumption that tort law was largely or wholly to blame for these hikes in premiums,¹¹⁵ legislated to curb radically both the scope of tortious liability and the quantum of damages recoverable.¹¹⁶ Largely as a consequence of these reforms, the law of torts in Australia became, and remains, quite different in very important respects from the law of torts in other common law jurisdictions.

As a final example of distinctive legislation prompted by highly publicised local concerns, consider the Congenital Disabilities (Civil Liability) Act 1976 (UK). This Act changed the law in the United Kingdom in response to the prominently documented inability of the common law of torts to provide adequately for victims of Thalidomide. In particular, the *Sunday Times* campaigned vigorously for legislative reform, and the newspaper's role was acknowledged in parliamentary debates.¹¹⁷ The resulting legislation, which is unique to the United Kingdom,¹¹⁸ created a novel cause of action on behalf Thalidomide victims that is parasitic upon a breach of duty owed to the child's mother.

¹¹⁴ *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Wellington, Government Printer, 1967) 97.

¹¹⁵ For an account of the crisis, see P Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 *Melbourne University Law Review* 649, 656–60; J Goudkamp, 'The Yong Report: An Australian Perspective on the Latest Response to Britain's "Compensation Crisis"' (2012) 28 *Journal of Professional Negligence* 4, 6–7.

¹¹⁶ The principal statutes are as follows: Civil Liability Act 2002 (NSW); Civil Liability Act 2003 (Qld); Personal Injuries Proceedings Act 2002 (Qld); Civil Liability Act 1936 (SA); Recreational Services (Limitation of Liability) Act 2002 (SA); Volunteers Protection Act 2001 (SA); Civil Liability Act 2002 (Tas); Wrongs Act 1958 (Vic) (as amended by the Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Vic), the Wrongs and Other Acts (Law of Negligence) Act 2003 (Vic) and the Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003 (Vic)); Civil Liability Act 2002 (WA); Volunteers and Food and Other Donors (Protection from Liability) Act 2002 (WA); Civil Law (Wrongs) Act 2002 (ACT); Personal Injuries (Liability and Damages) Act 2003 (NT); Personal Injuries (Civil Claims) Act 2003 (NT).

¹¹⁷ Hansard, House of Lords, 6 July 1976, vol 372, cols 1137–38.

¹¹⁸ In the United States, the Thalidomide tragedy prompted an amendment to the Federal Food, Drug, and Cosmetic Act, whereby regulatory requirements on manufacturers were stiffened. Similar reform occurred in

V. The Future: A Self-Sustaining Reaction

Section III of this chapter explained how the major common law jurisdictions have become effectively isolated from each other, and section IV demonstrated how this isolation has permitted local factors to influence the trajectory of tort law so that it has developed differently from one jurisdiction to another. Together, these parts of the chapter tell the tale of divergent evolution in the law of torts. One important point that we want to make by way of conclusion is that this process—jurisdictional isolation and jurisprudential divergence—is self-sustaining. As the law of torts in jurisdiction X becomes sufficiently different from that in jurisdiction Y, legal materials in jurisdiction X will become less relevant to disputes in jurisdiction Y than might have otherwise been the case, and vice versa. In turn, this increases the degree of isolation and the potential for local factors to operate separately on the different jurisdictions. The process then continues.

This hypothesis can be verified by looking at different legal systems around the world, some of which became isolated from the United Kingdom at an earlier point in time than others. The United States became isolated from the United Kingdom in terms of its legal sources earlier than the other major common law jurisdictions and, as per our hypothesis, tort law in the United Kingdom and in the United States have drifted quite far apart from each other. By contrast, Australia, Canada and New Zealand became isolated from the United Kingdom in terms of source unity much later in the day. The law in these jurisdictions is more similar, and it is unsurprising that judges in these jurisdictions look to legal sources in fellow Commonwealth jurisdictions more regularly than they turn to legal materials in The United States.

If we are correct in our claim that divergent evolution in the law of torts is a runaway phenomenon, this obviously has significant consequences for the prospect of finding a viable universal theory of the whole of the law of tort. Specifically, it means that the likelihood that a viable universal theory will be found, which is already low in our view, will dwindle over time. The point will eventually be reached, if it has not been reached already, that no single theory will be able to accommodate the diversity of rules that are found across the common law world.

Canada. For details, see HW Choi and JH Lee, 'Pharmaceutical Product Liability' in LD Edwards, AW Fox and PD Stonier (eds), *Principles and Practice of Pharmaceutical Medicine*, 3rd edn (Oxford, Wiley-Blackwell, 2010). In Australia and New Zealand, the matter was left to the common law.

